No. --------

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

THE EIGHT O'CLOCK CLUB, a corporation, and ROY WOOD,

Plaintiffs-Appellants,

vs.

OTTO K. BUDER and MICHIGAN LIQUOR CONTROL COMMISSION,

Defendants-Appellees.

APPEAL FROM THE MICHIGAN SUPREME COURT

BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

I.

The Motion to Dismiss or Affirm Is Untimely.

Before the jurisdictional statement and petition for appeal was in the hands of Justice Reed, the Solicitor General of the State of Michigan on behalf of the Appellees sent to the Clerk of this Court a printed brief opposing the allowance of this appeal. The Clerk, in his letter to the attorney for Appellants advising of the allowance of the appeal, indicated that the Justice had been in possession of this brief at the time of considering Appellants' petition for appeal. The typewritten motion to dismiss or af-

firm served on Appellants' attorney is identical in form to the brief and cites the same authorities, except for the preliminary and concluding paragraphs.

While the situation may not be technically within the scope of Rule 7, Paragraph 3 which also makes reference to Rule 12, Paragraph 5, it is within the spirit of the rule which is obviously for the purpose of preventing a litigant from raising the same questions twice. In view of the fact that the present motion gives no further reasons or additional grounds than contained in the original brief which has heretofore been considered, it seems reasonable that the matter should not now be reconsidered. We therefore conclude that the motion has not been timely submitted.

II.

Cases and Authorities Cited in the Motion Do Not Support Appellees' Theory that the Questions Raised Are Not Substantial Under the U. S. Constitution.

At the outset we do not subscribe to Appellees' statement that ordinarily the Michigan Supreme Court will grant leave to appeal when jurisdiction is alleged under 28 U.S.C. 1257. The original petition was addressed to the Chief Justice of the Michigan Supreme Court. If the other seven Justices were conferred with, there is nothing to indicate such to this writer. To ask the Court or a Justice to allow an appeal is akin to asking for an admission that they erred in deciding the case. It is a remarkable attribute for one to admit his errors but not generally does such an admission follow. The proposition is similar to a request for a re-hearing. Re-hearings in the Michigan Supreme Court have been so scarce that they could be counted on the fingers of one hand in the past twenty years. This Court is well aware of the attitude of State Courts in this respect because of the numerous applications for appeal which have been submitted and we believe that Appellees' contention in this respect is not logical or tenable.

Appellees' first case of *Indianapolis Brewing Co. vs. Liquor Control Commission*, 305 U. S. 391, 394, 59 S. Ct. 254, involved an act which prohibited importation of liquors from states which discriminated against Michigan

liquors. Obviously this was a real and substantial classification. The classification was not directed at the liquor but rather against all importers who were permitted under the laws of the State in which they did business to discriminate against Michigan importers and distillers. The case is not relevant.

The case of *Eberle vs. Michigan*, 232 U. S. 700, 34 S. Ct. 464, involved a statute prohibiting manufacture of liquor except certain wine in maximum allowed amounts. Had the statute gone further and allowed only hotels to make such wines, then the situation might be applicable to the case at bar. However, since the exemption applied to everyone alike, it has no relevancy here.

The case of *Zucht vs. King*, 260 U. S. 174, 43 S. Ct. 24, involved a State Act requiring vaccination of all pupils attending the public schools. Had the Act singled out all white children or colored children or any other class, it probably would have been unconstitutional. Since everyone was covered by its provisions it did not deny the equal protection of the laws. The further question in the case involved the correct procedure on appeal to this Court which has no application here.

The case of *Goesaert vs. Cleary et al*, 335 U. S. 464, involved a Michigan legislative act prohibiting the employment of women bar tenders but allowed wives of the licensed proprietors to act as such. This case is easily distinguishable. There is a proper difference between the two classes. Wives of licensees have a real interest in the proper operation of the establishment and therefore will more effectively maintain order solely because of the family relationship. It is obvious that a real benefit will inure to such wives if the establishment is properly operated and it would logically follow that there would be more incentive for such wives to aid in seeing that there was proper operation. There is no such question involved in the case at bar and the *Goesaert* case has no relevancy.

The case of *Tigner vs. State of Texas*, 310 U. S. 141, 60 S. Ct. 879, involved a State anti-trust law which exempted agricultural commodities and those who raised such products. Had the Act exempted only those farmers who sold such commodities to hotels, there could hardly be a doubt of the Act's invalidity under the 14th Amendment.

Throughout the Appellees' motion the assertion is made directly and by inference that there is not a substantial Federal question involved. To make a statement to such effect, which is obviously only a conclusion of the writer, is not proof of the fact and does not alone establish the validity of such a conclusion. The citation of a few cases which do not apply to the facts herein or the legislative act involved, does not justify such an opinion. If all one need do is file a motion and assert that the questions are not substantial, then this Court would never decide any case involving the Federal Constitution.

III.

Additional Cases and Grounds Indicating Not Only Are Substantial Federal Questions Involved But that Appellants' Grievances Are Real and Are Being Violated Under the 14th Amendment by Reason of the Michigan Public Act in Question.

A proper analysis of this Act shows that its aim is not directed at the activities of furnishing mixes and food for a charge in connection with allowing the patron (in this case a member of Appellants' Club) to drink his own liquor. The Act simply says that such activities must be done by a hotel. In fact, there is nothing in this legislation that says it must even be done on the hotel premises. In other words, if the hotel is run by a person, association, corporation or other entity, they may engage in these practices. It is more than noteworthy that any place or portion of the hotel may be selected within the judgment of such hotel. It is also noteworthy that the legislature apparently never considered there was any particular evil involved because there are no provisions for licensing, no agency designated to control the venture and no days or hours set for closing and opening. In other words, they have said that this is no evil, but only hotels can do it.

One of the first cases of this Court under the 14th Amendment is that of *Yick Wo vs. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. The legislation attacked was a law and administrative regulation prohibiting laundries of a certain type of construction while permitting those of a different type. The facts disclosed that all laundries of the

one construction which were prohibited were operated by Chinese and the others by the members of the Caucasian race. Further facts indicated that the laundered articles were done no differently in one than in the other. Such a classification was ruled by this Court to be so unsubstantial and discriminatory that it violated the equal protection portion of the 14th Amendment.

The case of *Quaker City Cab vs. Penn*, 277 U. S. 389; 48 S. Ct. 553; 72 L. Ed. 927, was decided in 1927. The legislative act placed a tax on all taxicabs operated by corporations and exempted all others operated by natural persons. In so singling out corporations, the majority of this Court ruled the act void. The language of the late Justice Butler is pertinent and it is herewith quoted:

> "The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification, to be consistent with the equal protection clause, must be based on a real and substantial difference having reasonable relation to the subject of the legislation. No decision in this Court gives support to such a classification and the Supreme Court of Pennsylvania has condemned such a classification. In no view can it be held to have more than an arbitrary basis."

Of like effect is *Frost vs. Corporation Commission*, 278 U. S. 515; 49 S. Ct. 235; 73 L. Ed. 483, in which a similar statute based on the classification of a corporation was held to have violated the 14th Amendment.

The statute providing that not more than a prescribed number of persons shall sleep in the same room in a lodging house is discriminatory in favor of hotels and inns and violates the 14th Amendment and it is not a proper exercise of the police powers and was so held by the highest State Court of Illinois in the following cases:

> *People vs. Schwenk*, 257 Ill. 384; 100 N. E. 994;
> *Bailey vs. People*, 190 Ill. 28; 60 N. E. 98.

What conceivable basis is there for allowing hotels in this case to engage in these operations and preclude all

others including this appellant from so doing? It isn't the place because the hotel can put the establishment anywhere. The hotel isn't different because it is required to have fire escapes, etc. for the reason that these things peculiar to a hotel are not involved as a part of the subject matter of the Act. There is nothing about hotel owners that makes them any different from others. They are not better qualified to pick a proposed place for such an establishment on any basis that they have better judgment than anyone else. It is purely a simple and arbitrary delegation of a right without any basis whatever which is denied to these appellants and others. There are no conceivable circumstances which can be thought of which would indicate any rational basis for this discrimination. Neither the Michigan Supreme Court nor the Solicitor General have at any time suggested any state of facts which would reasonably justify such an arbitrary classification. The Michigan Supreme Court disposed of the whole situation by a single sentence to the effect that the legislature thought that it was practicable. If cases can be disposed of which involve the very fundamental right guaranteed under the 14th Amendment by an expression that it is practical, there isn't a single act that could not be upheld by the making of such a statement.

The question of the due process is to some extent tied up with the foregoing. The legislature has condoned the activities mentioned but has said they must be by a hotel. Since they recognize no evil in the activities, then it is in the same category as any other lawful venture. Appellants' club premises are particularly and peculiarly adapted for this type of operation. Our jurisdictional statement cites several cases substantiating the proposition that a legitimate business or operation cannot be suppressed without violating the due process provision of the 14th Amendment and for the sake of brevity we will not repeat or enlarge upon the same.

CONCLUSION

We submit that the propositions involved come within the applicable decisions of this Court: that the Act is so entirely repugnant to the rights of Appellants under the 14th Amendment as to leave no doubt concerning it: that,

for the reasons herein and as pointed out in the jurisdictional statement, the Federal questions are substantial: and this Court should proceed to correct the injustices permitted by the Act and deny Appellees' motion to dismiss or affirm and protect these Appellants' rights under the 14th Amendment and invalidate the legislation as being repugnant to the provisions of the U. S. Constitution.

Respectfully submitted,

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